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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Joseph Artiaga,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
14

No. CV-13-00281-TUC-RM

ORDER

15 On August 2, 2016, Magistrate Judge Bruce G. Macdonald issued a Report and
16 Recommendation (Doc. 35) recommending that this Court deny Petitioner's Petition
17 Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus. No objections to the Report and
18 Recommendation were filed.

19 A district judge must "make a de novo determination of those portions" of a
20 magistrate judge's "report or specified proposed findings or recommendations to which
21 objection is made." 28 U.S.C. § 636(b)(1). The advisory committee's notes to Rule
22 72(b) of the Federal Rules of Civil Procedure state that, "[w]hen no timely objection is
23 filed, the court need only satisfy itself that there is no clear error on the face of the record
24 in order to accept the recommendation" of a magistrate judge. Fed. R. Civ. P. 72(b)
25 advisory committee's note to 1983 addition. *See also Johnson v. Zema Sys. Corp.*, 170
26 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made, the
27 district court judge reviews those unobjected portions for clear error."); *Prior v. Ryan*,
28 CV 10-225-TUC-RCC, 2012 WL 1344286, at *1 (D. Ariz. Apr. 18, 2012) (reviewing for

1 clear error unobjected-to portions of Report and Recommendation).

2 The Court has reviewed Judge Macdonald's Report and Recommendation, the
3 parties' briefs, and the record. The Court has not found any clear error in Judge
4 Macdonald's recommended disposition.

5 With respect to the ineffective assistance of trial counsel claims found by Judge
6 Macdonald to be procedurally defaulted, the Court notes that Petitioner has not argued
7 that ineffective assistance of post-conviction review counsel establishes cause under
8 *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), for the procedural default of any claims of
9 ineffective assistance of trial counsel. Even if Petitioner had raised a *Martinez* issue, he
10 has not shown that the underlying procedurally defaulted ineffective assistance of trial
11 counsel claims are substantial. *See id.* at 1318.

12 Judge Macdonald found that Petitioner relied only on state law in presenting to the
13 state court his claim regarding the denial of a continuance. (*See* Doc. 35 at 40.) In his
14 opening brief on direct appeal to the Arizona Court of Appeals, Petitioner cited only to
15 state cases regarding when denial of a continuance violates constitutional rights. (Doc.
16 23-2, Exh. O at ¶ 16.) However, *Arizona v. Hein*, 674 P.2d 1358, 1367 (Ariz. 1983),
17 cited by Petitioner in the opening brief, discusses when a defendant's federal
18 constitutional rights are violated by the denial of a request for a continuance.
19 Additionally, Petitioner argued in his opening brief that he had a right under the Fifth
20 Amendment to the United States Constitution to challenge grand jury proceedings, and
21 connected this argument to his argument regarding the denial of a continuance. (*Id.* at ¶
22 17.) Respondents conceded in their Answer that Petitioner's opening brief on direct
23 appeal in state court raised the argument regarding the denial of a continuance as a
24 federal claim. (Doc. 23 at 11.) However, even if Petitioner's opening brief on direct
25 appeal could be interpreted as fairly presenting a claim that the denial of a continuance
26 violated Petitioner's federal constitutional rights, the opening brief argued only that the
27 denial of a continuance prevented Petitioner's trial counsel from reviewing the grand jury
28 transcript for error. As explained in Judge Macdonald's Report and Recommendation,

1 any constitutional errors in Petitioner's grand jury proceedings are harmless because
2 Petitioner was ultimately convicted of the offenses charged. *See United States v.*
3 *Mechanik*, 475 U.S. 66, 70 (1986); *Williams v. Stewart*, 441 F.3d 1030, 1042 (9th Cir.
4 2006). Petitioner did not argue in state court that the denial of a continuance prevented
5 defense counsel from adequately preparing for trial. To the extent that Petitioner is now
6 arguing that the denial of a continuance prevented adequate trial preparation, that claim is
7 unexhausted and procedurally defaulted. *See Ariz. R. Crim. P. 32.2(a); Coleman v.*
8 *Thompson*, 501 U.S. 722, 735 n.1 (1991). Petitioner has not shown cause or prejudice to
9 excuse the procedural default. *See Murray v. Carrier*, 477 U.S. 478, 494 (1986).

10 Judge Macdonald found Petitioner's claim of prosecutorial misconduct to be
11 unexhausted and procedurally defaulted. The Court notes that, in Petitioner's opening
12 brief on direct appeal to the Arizona Court of Appeals, Petitioner argued that the state
13 violated his constitutional rights by misrepresenting to the grand jury the reasons for his
14 failure to appear. (Doc. 23-2, Exh. O at ¶ 19.) The Court agrees that this argument did
15 not fairly present a federal claim of prosecutorial misconduct. *See Baldwin v. Reese*, 541
16 U.S. 27, 32-33 (2004) (state prisoner must alert state court to alleged federal nature of
17 claim); *Shumway v. Payne*, 223 F.3d 982, 987-88 (9th Cir. 2000) (general appeal to broad
18 constitutional guarantee does not satisfy fair presentation requirement). However, even if
19 the argument could be interpreted as fairly presenting a federal claim of prosecutorial
20 misconduct, the claim relates only to alleged constitutional errors in the grand jury
21 proceedings, and any constitutional errors in those proceedings are harmless due to
22 Petitioner's convictions of the offenses charged. *See Mechanik*, 475 U.S. at 70; *Williams*,
23 441 F.3d at 1042.

24 Accordingly,

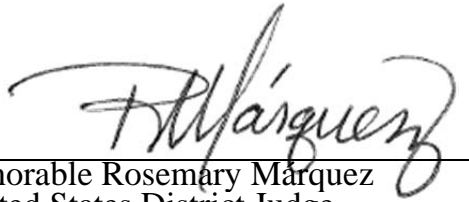
25 **IT IS ORDERED** that the Report and Recommendation (Doc. 35) is **accepted**
26 **and adopted**.

27 **IT IS FURTHER ORDERED** that the Petition Under 28 U.S.C. § 2254 for a
28 Writ of Habeas Corpus (Doc. 1) is **denied**, and this case is **dismissed with prejudice**.

1 The Clerk of Court is directed to enter judgment accordingly and close this case.

2 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
3 Section 2254 Cases, the Court declines to issue a certificate of appealability, because
4 reasonable jurists would not find the Court's procedural ruling debatable. *See Slack v.*
5 *McDaniel*, 529 U.S. 473, 484 (2000).

6 Dated this 8th day of September, 2016.

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11 Honorable Rosemary Marquez
12 United States District Judge
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